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No. 03-70

IN THE

Supreme Court of the United States

DAVID A. SHALLER, M.D.
Petitioner,

v.

UNITED STATES,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR REHEARING

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REASONS FOR GRANTING THE PETITION FOR REHEARING

The Court should consider and grant this Petition for Rehearing because it puts forth "substantial grounds not previously presented" in the Petition for Certiorari:

1. A Constitutional Violation of Substantive Due Process.

A constitutional violation of substantive due process is presented along with the *sole* "evidence of record" relied upon by the Department of Veterans Affairs (DVA) to fire Plaintiff.

This "record" should properly be considered by The Court in its determination. Plaintiff believes when this "record" is properly considered, the DVA's action will be shown to be so manifestly arbitrary and conscience-shocking, it rises to the level of a constitutional violation of substantive due process which warrants This Court's intervention.

This Court has recognized "time and again that the touchstone of due process is protection of the individual against arbitrary action of the government."[1]

This Court provided "guideposts" to identify government action that "can properly be characterized as arbitrary or conscience-shocking in a constitutional sense."[2]

The Court reasoned that whether a government action "can properly be characterized as arbitrary or conscience-shocking in a constitutional sense" requires a determination on a case-by-case basis with "the utmost care."[2]

". . . Only a purpose to cause harm unrelated to the legitimate . . . [official purpose] . . . will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation."[1]

". . . For executive action challenges raise a particular need to preserve the constitutional proportions of constitutional claims, lest the Constitution be demoted to what we have called a font of tort law. Thus, in a due process challenge to executive action, the threshold question is whether the behavior of the government officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience."[1]

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[1] *County of Sacramento v Lewis*, 523 U.S. 833, 845 (1998).

[2] *Collins v. City of Harker Heights*, 503 U.S. 115, 125, 128 (1992).

Plaintiff's matter passes this test. Simply put, he was fired for being a responsible and conscientious physician, faithful to the Code of Medical Ethics and the government's own Code of Ethics.

Plaintiff was fired because of his letter to the DVA's Inspector General of December 30, 1988.[3] This letter was the *sole "evidence of record"* the DVA used to justify the firing. The DVA's campaign of retaliation began after the ventilator incident in March, 1988,[4] continued through his firing in January, 1991, and persists to this day.

THE LETTER

Plaintiff's letter of December 30, 1988 to Mr. Kroll of the Office of Inspector General reported continued mismanagement, negligence, and malpractice at the Wilkes-Barre VA Hospital. It evidenced another Nurse Practitioner resignation (she was the fourth), and documented physicians' futile attempts to obtain Plaintiff's expertise in serious medical cases. One ophthalmologist promptly called Plaintiff's supervisor who refused her plea for Plaintiff to see her in-patients. All in-patient rheumatology consultations were denied and scheduled as outpatients. This administrative decision jammed the outpatient clinics.

Representative cases were attached to the letter as documentation. They were copied from patient's charts and inadvertently included their name and hospital number. The DVA's decision prohibiting Plaintiff from treating all in-patients cost Robert Adams his life.[5]

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[3] Appendix.

[4] Petition for Certiorari, footnote #2. pg. 2-3.

[5] Petition for Certiorari, footnote #8. pg. 9.

CAMPAIGN OF RETALIATION WITH INTENTION TO HARM[6]

The DVA perpetrated an open campaign of retaliation, calculated to visibly damage Plaintiff's personal and professional life and thereby "discourage" others from interfering with management's decisions.[7] This involved illegal activity such as bringing knowingly false charges of sexual misconduct (charges were "anonymous"), altering tapes and transcripts of Inspector General hearings (confirmed by the FBI), issuing false W-2 statements (confirmed by the IRS), and mail tampering (confirmed by the Postal Inspector).

Particularly egregious was DVA's flagrant abuse of authority whereby Plaintiff was assigned nursing duties, and later reassigned to rewrite expired prescriptions, while prohibiting his treatment of seriously ill hospitalized patients requiring his expertise. The intentional and reckless disregard for patients caused deaths, resulting in large malpractice awards.[8] The management practices were implemented nationwide, contributing to increased malpractice and malpractice claims paid, nationwide.[9]

The gravest and most egregious harm to Plaintiff was being wrongly fired for allegedly "violating" the Privacy Act;[10] an

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[6] Summarized from Plaintiff's sworn and unrefuted congressional testimony before the House Government Operations Subcommittee on Human Resources and Intergovernmental Relations. Washington, DC. November 20, 1991.

[7] In 1988, the DVA instituted monetary incentives to reward "efficient" hospital administrators. Thereafter, administrative decisions grievously interfered with patient care, contributing to malpractice and deaths.

[8] *Id.* at 4 and 5.

[9] Petition for Certiorari, footnote #13, pg. 12.

[10] The Privacy Act 5 U.S.C. § 552a. (b)(8) and (b)(9) permit disclosure:

"(b)(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such

allegation that is unequivocally false on its face. A mere read of the law shows there was no violation and *all* the named veterans or surviving widows provided statements that they "were grateful for Dr. Shaller's action on their behalf".

Nevertheless, a "disciplinary board" embarked on a series of "disciplinary hearings" spanning many months, contravening DVA regulations. One veteran testified that his suffering caused "enough pain to take suicide" and provided compelling testimony supporting Plaintiff's letter. After that, testimony from other veterans or surviving widows was prohibited. The DVA's attorney was compelled to remark that "due process did not apply".

The "disciplinary board" then made a "legal judgment" that the attachments to Plaintiff's letter sent to two[11] of the five individuals copied constituted "a violation of the Privacy Act".[12] The DVA's "disciplinary board" were non-peers, with

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disclosure notification is transmitted to the last known address of such individual:

(b)(9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee."

[11] (1) Paul W. Schafer, M.D., Director, National, Association of VA Physicians (who was also a VA physician) and (2) Ambassador Bruce Laingen, Executive Director, National Commission on the Public Service. Chartered by Congress, this commission was also known as the Volcker Commission. (Paul Volcker, former Chairman Federal Reserve).

[12] During the hearing, DVA's counsel *admitted* he released unredacted pages from patients' charts, to an unauthorized person without consent. [This is precisely why he was prosecuting Plaintiff!] He was permitted to "recall his mistake".

DVA counsel violated the plain language of The Privacy Act, 5 U.S.C. § 552a. (b)(8), because his release was not pursuant to a showing of compelling circumstances affecting the health or safety of veterans, and he failed to notify them.

This shows the DVA's unequal treatment of its employees.

no legal background or direct patient care responsibilities. It stated:

> "While having in and of itself no potential to harm the individual patients concerned, there has been great and irreparable damage to the Department of Veterans Affairs . . ."

It concluded in a logic defying statement of the absurd:

> "It is the Board's opinion that Dr. Shaller gives no indication that he would be significantly affected by any attempt at rehabilitation. He has shown no remorse."

Plaintiff was then fired by the Secretary, DVA.[13]

Outrageous! Plaintiff did not commit malpractice. He was fired for reporting and trying to prevent it![14] This executive administrative decision is truly conscience-shocking to anyone concerned about patient care, and in due time, we are all patients.

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[13] However, if there were a violation of the Privacy Act, DVA is obligated to follow its' Regulations For Statutory Offenses: "Discharge will be considered as a mandatory penalty if an employee is tried and convicted of a felony or capital offense by a court of competent jurisdiction . . . Those statutes authorize or prescribe disciplinary and/or criminal penalties . . . Where the statute does not make mandatory the imposition of a specific disciplinary penalty . . . the determination of an appropriate disciplinary penalty will be left to the discretion of the appropriate approving authority." (DM&S Supplement MP-5, Part II June 1, 1964).

So, if a physician were guilty of a statutory violation, the appropriate penalty is prescribed by *that* statute. The Privacy Act authorizes both civil and criminal penalties.

DVA didn't prosecute Plaintiff in a court of law for "violating" the Privacy Act because there was no violation! Instead, it behaved *unconscionably* and publicly fired him. This caused permanent ruin to his career. DVA's *punishment* effectively "discouraged" others.

[14] Physicians determined to have engaged in malpractice were rewarded by promotion and pay increases because they did management's bidding!

The DVA conceded that Plaintiff's letter has "no potential to harm the individual patients." However, it claimed that reporting malpractice to the DVA's Dr. Schafer, and Ambassador Laingen, Chairman of a congressional commission, caused "irreparable damage to the DVA". This is preposterous. Of course, no evidence was presented to support this absurd claim. The finding that Plaintiff showed "no remorse or rehabilitation potential" is ludicrous on its face.

Congress *found*:[15] "THE DVA DISCOURAGES THE REPORTING OF POOR QUALITY CARE BY HARASSING WHISTLEBLOWERS OR FIRING THEM". Plaintiff was identified by name as "typical of treatment received by DVA whistleblowers". Congress' investigation revealed the *deplorable* treatment of medical personal who attempt to expose poor quality care. DVA management has often behaved *unconscionably* in *punishing* whistleblowers, and has acted with impunity."

Thus, Congress *found* Plaintiff's treatment was *deplorable*, and the DVA, acted *unconscionably*, [shockingly unfair or unjust; Webster's dictionary] thereby rising to the level of a constitutional violation of substantive due process.

> "Peer review and reporting through the chain of command does not always work. In theses cases public denunciation or whistleblowing must still be part of the armament of professional ethics. The obligation to blow the whistle, when all else has failed, is grounded in two simple ideas:
>
> First, those who remain silent consent.
>
> Second, the inaction of good people is the main reason why bad people continue to harm others."[16]

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[15] U.S. Congress House Report 102-1062. November 9, 1992. Petition for Certiorari, pg. 58a-60a. Emphasis added.

[16] Health Care Ethics Principles and Problems. Thomas M. Garrett, Harold W. Ballie, Rosellen M. Garrett. Prentice Hall. 1989.

2. A Precedent Setting Case Requiring This Court's Guidance.

This is a precedent setting case and requires the guidance of This Court to delineate the justiciability that Congress intended. There are no reported precedents under the statute at issue; 38 U.S.C. § 7462(f)(1) which provides DVA physicians with judicial review for major adverse actions:

> A section 7401 employee adversely affected by a final order or decision of a Disciplinary Appeals Board (as reviewed by the Secretary) may obtain judicial review of the order or decision.

However, Plaintiff was unjustly precluded from judicial review. "Subject matter jurisdiction" was established in District Court. Plaintiff's request for restitution [back pay] exceeded $10,000.00 [ten thousand dollars], and thus fell under The Tucker Act, 28 U.S.C. § 1491(a)(1). Therefore, pursuant to the Tucker Act, and with District Court's finding of "*joint subject matter jurisdiction*", it was transferred to The U.S. Court of Federal Claims which has exclusive jurisdiction under The Tucker Act.

The U.S. Court of Federal Claims spent 5 years considering Defendant's motion to dismiss. Without oral argument, or the ability to present *any* evidence or testimony, the Court dismissed in a 28 page **Unpublished Decision** finding no "subject matter jurisdiction."[17] The appellate Court affirmed.

Traditionally, equity will not suffer a wrong without a remedy. Here, Plaintiff was not afforded the applicable statutory remedy, nor been directed to any court with jurisdiction. The courthouse door was slammed shut!

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[17] On September 13, 2002, Plaintiff entered a motion to admit evidence on "subject matter jurisdiction". The motion was granted February 4, 2003. The Appeals Court decision (already dictated, typed and mailed) was dated and postmarked February 5, 2003. It is doubtful the evidence (40 pages) was ever considered; thereby causing a *harmful material error.*

There was no adjudication on merit. The language of the statute is absolutely clear and unambiguous. Thus, it appears *The Courts nullified Congress' intent and the law.*

Therefore, This Court's guidance is required to delineate how a wrongly fired DVA physician can obtain judicial review [along with restitution; reinstatement and back pay].

3. The United States Also Has A Compelling Interest To *Justly* Adjudicate This Matter.

A failure to justly adjudicate this matter will exacerbate DVA's recruitment difficulty. A 2003 DVA field survey reported over 900 physician vacancies. [U.S. Medicine Vol. 39 No.9. September 2003]. Congress acknowledges DVA's recruitment crisis: "The U.S. is currently facing a critical workforce shortage in all areas of hospital operations including clinical . . ." [HR 1951: VA Medical Workforce Enhancement Act of 2003].

Graduating physicians considering a DVA career, now have web access to these proceedings. They will learn the Courts decided not to decide Plaintiff's case, despite a statute that explicitly provides DVA physicians with judicial review. This means that the DVA's *deplorable* and *unconscionable* conduct is *perfectly legal*, and can't be challenged. Physicians can be fired on the whim of management, and have no cognizable legal recourse. [Plaintiff was fired for writing a letter to the Inspector General]. After reviewing Plaintiff's case, an international authority determined that the DVA is "unsafe" for practicing physicians until the matter is properly resolved. [The Semmelweis Society International]. As these facts become more widely known, the DVA will be unable to attract and retain a skilled physician workforce.

Plaintiff's matter continues to be a compelling public concern: "A congressional subcommittee looking at VA medical care later cited Shaller as one example of how "honest employees have had their jobs eliminated and their

lives destroyed because they attempted to expose poor patient care." [Pittsburgh Post Gazette: The Cost of Courage: Doctors who spoke out. October 26-29, 2003].

This Court has an opportunity to begin the process to "right the wrong."

CONCLUSION

The petition for rehearing should be granted.

* * * *

"Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example."

Justice Louis D. Brandeis
United States Supreme Court

* * * *

Respectfully submitted,

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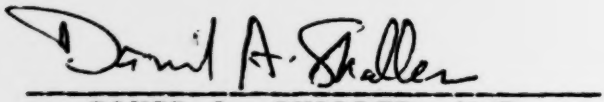
CERTIFICATE

I certify pursuant to Supreme Court Rule 44.2 that this petition for rehearing is restricted to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented, and that it is presented in good faith and not for delay.



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